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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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8 FEDERAL TRADE COMMISSION,
9 STATE OF NEW YORK, STATE OF
10 CONNECTICUT, COMMONWEALTH OF
11 PENNSYLVANIA, STATE OF DELAWARE,
12 STATE OF MAINE, STATE OF MARYLAND,
13 COMMONWEALTH OF MASSACHUSETTS,
14 STATE OF MICHIGAN, STATE OF
15 MINNESOTA, STATE OF NEVADA, STATE
16 OF NEW HAMPSHIRE, STATE OF NEW
17 JERSEY, STATE OF NEW MEXICO, STATE
18 OF OKLAHOMA, STATE OF OREGON,
19 STATE OF RHODE ISLAND, and STATE OF
20 WISCONSIN,

21 Plaintiffs,

22 v.

23 AMAZON.COM, INC., a corporation,

24 Defendant.

CASE NO. 2:23-cv-01495

PLAINTIFF FTC'S MOTION FOR
LEAVE TO TEMPORARILY
SEAL PORTIONS OF THE
COMPLAINT

NOTE ON MOTION CALENDAR:
Friday, October 13, 2023

21 Plaintiff Federal Trade Commission respectfully moves, pursuant to Local Civil Rule
22 5(g), 15 U.S.C. § 57b-2, and 16 C.F.R. § 4.10(g), to temporarily seal portions of the Complaint
23 in this action for fourteen days. Dkt #3. The FTC makes this request to comply with its
24 regulations governing treatment of confidential information submitted to the FTC during its pre-
complaint investigation and to give affected parties an opportunity to ask the Court to seal

1 portions of the Complaint on a permanent basis. The FTC is not claiming confidentiality with
2 respect to any information that is the subject of this Motion.

3 The FTC conducted a pre-complaint investigation in which it received information from
4 Defendant Amazon.com, Inc. (“Amazon”) and third parties (collectively, “producing parties”)
5 designated as confidential pursuant to federal statute and FTC rules. *See* 15 U.S.C. § 57b-2; 16
6 C.F.R. § 4.10(g). Certain information so designated by producing parties is disclosed in
7 Plaintiffs’ Complaint. Dkt. #3. FTC regulations require the FTC to afford parties who submit
8 confidential information “an opportunity to seek an appropriate protective or *in camera* order”
9 before publicly disclosing such information. 16 C.F.R. § 4.10(g). Plaintiffs have accordingly
10 filed a redacted version of the Complaint on the public docket, Dkt. #1, filed a sealed version of
11 the Complaint with the redacted information highlighted, Dkt. #3, and filed this Motion to
12 provide an opportunity for the producing parties whose information is at issue to seek
13 appropriate relief from the Court.

14 The FTC will provide the producing parties with notice that their information is being
15 filed under seal and a copy of any order the Court enters with respect to this Motion. The FTC
16 will also propose to meet and confer with any party that intends to move to seal portions of the
17 Complaint on a permanent basis.

18 To expedite the process of making court records public, the FTC requests that the Court’s
19 order automatically unseal any portions of the Complaint that a party has not sought to seal on a
20 permanent basis within fourteen days after the Court issues an order. The FTC has consulted
21 with all other Plaintiffs (the “State Plaintiffs” and collectively with FTC, “Plaintiffs”), none of
22 whom object to the procedure that the FTC has proposed.

LEGAL STANDARD

“Historically, courts have recognized a ‘general right to inspect and copy public records and documents, including judicial records and documents.’” *Kamakana v. City & Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). When a court considers a request to seal, “a strong presumption in favor of access is the starting point.” *Id.* at 1178 (internal quotation marks and citations omitted); *see also* Local Rules W.D. Wash. LCR 5(g) (“There is a strong presumption of public access to the court’s files.”). Courts apply a compelling interest standard when considering a request to seal materials related to the merits of a case. *Kamakana*, 447 F.3d at 1178-79; *New Freedom Ops LLC v. Iovino*, 2023 WL 2329405, at *1 (W.D. Wash. Jan 19, 2023). Under this standard, the party seeking to seal a judicial record bears the burden of showing that it has “compelling reasons supported by specific factual findings” to keep the information secret and that those compelling reasons “outweigh the general history of access and the public policies favoring disclosure.” *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted).

16 || Under LCR 5(g)(3)(B), a party seeking to seal documents must provide:

17 “[a] specific statement of the applicable legal standard and the reasons for keeping
18 a document under seal, including an explanation of: (i) the legitimate private or
19 public interests that warrant the relief sought; (ii) the injury that will result if the
relief sought is not granted; and (iii) why a less restrictive alternative to the relief
sought is not sufficient.”

ARGUMENT

21 The FTC respectfully requests that the Court temporarily seal portions of the Complaint
22 for fourteen days to allow any affected parties an opportunity to file permanent sealing motions.
23 During the FTC's pre-complaint investigation in this matter, Amazon and third parties provided
24 documents, information, or testimony to the FTC and designated that information as confidential

1 pursuant to federal statute and FTC rules. While the FTC may disclose such information “in
 2 judicial proceedings to which the Commission is a party,” 15 U.S.C. § 57b-2(d)(1)(C), (d)(2),
 3 FTC regulations require that the producing parties “be afforded an opportunity to seek an
 4 appropriate protective or *in camera* order” before the public disclosure of such information. 16
 5 C.F.R. § 4.10(g).

6 Portions of Plaintiffs’ Complaint disclose or reflect documents or information that
 7 Amazon and third parties produced in response to compulsory process that was designated by the
 8 producing parties as confidential. Plaintiffs have highlighted those portions of the Complaint,
 9 and the FTC requests that the Court maintain those portions of the Complaint under seal for
 10 fourteen days after the filing of the Complaint to allow the producing parties an opportunity to
 11 seek permanent relief from the Court.

12 Plaintiffs have filed a public version of the Complaint that redacts all information
 13 designated as confidential by the producing parties. *See Fairhaven Health, LLC v. Bioorigyn*,
 14 2021 WL 4307071, at *2 (W.D. Wash. Sept. 22, 2021) (“The Court strongly prefers redacting
 15 documents to filing them completely under seal.”). There is no less restrictive alternative
 16 available to the FTC under 15 U.S.C. § 57b-2 and 16 C.F.R. § 4.10.

17 LCR 5(g)(1)(A) and 5(g)(3)(A) impose meet-and-confer and related certification
 18 requirements. The FTC respectfully requests that the Court waive those requirements in this
 19 instance. The FTC could not have met and conferred with Amazon or third parties without
 20 revealing its then non-public lawsuit. Now that the instant lawsuit has been filed, the FTC
 21 proposes to meet and confer with any party that intends to move to seal portions of the
 22 Complaint on a permanent basis before any such motions are filed. *See Garcia v. Duarte*
 23 *Reynosa*, 2020 WL 363404, at *3 (W.D. Wash. Jan. 22, 2020) (maintaining temporary seal for
 24 documents filed with *ex parte* temporary restraining order while parties met and conferred).

CONCLUSION

2 For the reasons above, the Court should enter the Proposed Order and temporarily seal
3 portions of the Complaint in this action for fourteen days.

s/ Susan A. Musser

*Attorneys for Plaintiff
Federal Trade Commission*

I certify that this memorandum contains
1,032 words, in compliance with the Local Civil
Rules.

CERTIFICATE OF SERVICE

I, Susan A. Musser, certify that on September 26, 2023, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system. Additionally, today I effectuated service of the same by email on Kevin M. Hodges, counsel for the Defendant. I understand that Defendant's counsel has consented to service in this manner. A copy of this Motion will also be personally delivered today to Kevin Hodges, counsel for Defendant, at Williams & Connolly LLP, 680 Maine Ave SW, Washington, DC 20024.

s/ Susan A. Musser
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